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No. 97-372

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED STATES SHOE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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10 pp

TABLE OF AUTHORITIES

Cases:	Page
Capitol Greyhound Lines v. *Brice*, 339 U.S. 542 (1950)	4
Evansville-Vanderburgh Airport Authority District v. *Delta Airlines, Inc.*, 405 U.S. 707 (1972)	2, 3, 4
Fairbank v. *United States*, 181 U.S. 283 (1901)	2, 5, 6
Massachusetts v. *United States*, 435 U.S. 444 (1978)	2, 3, 6, 7
Pace v. *Burgess*, 92 U.S. 372 (1876)	6
United States v. *International Business Machines Corp.*, 116 S. Ct. 1783 (1996)	1, 3
United States v. *Sperry Corp.*, 493 U.S. 52 (1989)	2, 3, 4
Untermyer v. *Anderson*, 276 U.S. 440 (1928)	6
Constitution and statutes:	
U.S. Const. Art. I, § 9, Cl. 5 (Export Clause)	1
Internal Revenue Code (26 U.S.C.):	
§ 9505(a)(3)	6
§ 9602(b)(1)	6
§ 9602(b)(3)	6
Water Resources Development Act of 1986, Pub. L. No. 99-662, 100 Stat. 4208	7
Miscellaneous:	
132 Cong. Rec. (1986):	
pp. 4921-4923	7
pp. 4937-4938	7
p. 4940	7
pp. 4958-4959	7

Miscellaneous—Continued: Page

H.R. Rep. No. 251, 99th Cong., 1st Sess., Pt. 4 (1985) 5, 7
S. Rep. No. 126, 99th Cong., 1st Sess. (1985) 7
S. Rep. No. 228, 99th Cong., 1st Sess. (1986) 5

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1. a. Respondent is incorrect in contending that this case is "governed" (Br. in Opp. 9) by this Court's recent decision in *United States* v. *International Business Machines Corp.*, 116 S. Ct. 1793 (1996). In the *IBM* case, the Court held that a federal tax imposed on goods for export is invalid under the Export Clause of the Constitution even if the tax is levied without discrimination on both imports and exports alike. 116 S. Ct. at 1797. As the court of appeals noted, in light of that holding, it is not disputed in the present case that, "if the [Harbor Maintenance Tax] is a tax on goods in export transit, it is invalid" (Pet. App. 16a).

As the court of appeals recognized, this case addresses a distinctly different question than was presented in *IBM*. The question presented in this case is whether the charges imposed by the Harbor Maintenance Tax constitute a "permissible user fee" that seeks to recover the costs of providing federal services (Pet. App. 16a, 23a). This Court has long recognized the distinction that exists between an unconstitutional tax on exports and a permissible user fee that exacts "compensation * * * for services properly rendered." *Fairbank* v. *United States*, 181 U.S. 283, 304 (1901). The court of appeals correctly understood that the proper boundaries of this distinction were not at issue in the *IBM* case. Instead, as the court of appeals acknowledged (Pet. App. 16a-23a), the distinction between unconstitutional taxes on exports and permissible fees for goods in transit is governed by the standards established by this Court in cases such as *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, 405 U.S. 707 (1972), *Massachusetts* v. *United States*, 435 U.S. 444 (1978), and *United States* v. *Sperry Corp.*, 493 U.S. 52 (1989).

This Court's decision in *IBM* thus plainly does not "govern" this case. That decision neither considers nor resolves the question whether a charge assessed on the use of the ports of the United States is "a permissible user fee" rather than a constitutionally proscribed tax (Pet. App. 23a).[1]

[1] At an earlier stage of this case, the government argued that, even if the Harbor Maintenance Tax were regarded as a "tax" rather than a "user fee" (Pet. App. 23a), this assessment would nonetheless be constitutional because it applies without discrimination to exports and imports alike. During the pendency of this litigation, this Court rejected an indistinguishable contention in the *IBM* case (116 S. Ct. at 1795). The government has therefore abandoned that position in this case and now raises only the claim that the Harbor Maintenance Tax is "a permissible user fee" under the analysis of cases such as *United States* v. *Sperry Corp.*, *supra*, and *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, *supra*. See Pet. 12-25. Because the government contends only that the port use charge is "a permissible user fee" (Pet. App. 23a), it obviously is not "telling that the Government's petition in this case is devoid of even a mention of *IBM*" (Br. in Opp. 10).

The opinion below does not support respondent's statement that, in deciding whether or not the charge is a "prohibited tax" or a "permissible user fee" (Pet. App. 23a), "[t]he Court of Appeals applied *IBM*" (Br. in Opp. 10). To the contrary, in the course of deciding whether the charge is a proscribed tax or a permissible fee, the court of appeals "applied" (although in an incorrect fashion) this Court's decisions in *United States* v. *Sperry Corp.*, *supra*, *Massachusetts* v. *United States*, *supra*, and *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, *supra*. See Pet. App. 16a-23a.

b. Indeed, respondent ultimately acknowledges (Br. in Opp. 12-13 & n.8) that the question whether the Harbor Maintenance Tax is "a permissible user fee" rather than a proscribed tax turns on the analysis applied by this Court in *United States* v. *Sperry Corp.*, *supra*, and *Massachusetts* v. *United States*, *supra*. Respondent contends, however, that applying these decisions to determine the constitutionality of the Harbor Maintenance Tax is merely "a fact-specific inquiry" that does not warrant this Court's review (Br. in Opp. 13). That contention is not correct.

The proper application of the constitutional tests established by this Court to distinguish between a proscribed tax and a permissible user fee presents questions of law, not of fact. For example, in holding

the Harbor Maintenance Tax unconstitutional, the court of appeals relied greatly on the fact that the fee is based upon the value of the goods shipped, rather than on tonnage or other similar factors (Pet. App. 17a-18a). In so holding, the decision of the court of appeals conflicts with this Court's approval of an *ad valorem* user fee in *United States* v. *Sperry Corp.*, 493 U.S. at 60, and disregards this Court's frequent admonition that a constitutionally permissible fee need not "be precisely calibrated to the use that a party makes of Government services." *Ibid.* See also *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542, 545 (1950); Pet. 20-21.

The court of appeals also stated that it was constitutionally objectionable that the port use fee is imposed directly on shippers rather than on the vessel owners (Pet. App. 19a). In doing so, the court of appeals failed to honor this Court's clear holding in *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, 405 U.S. at 714, that it is "not * * * particularly important whether the charge is imposed on the passenger himself, to be collected by the airline, or on the airline, to be passed on to the passenger if it chooses." As this Court emphasized in *Evansville*, the fee may be imposed either on the person who engages the transportation service or the person who provides that service because, in either case, it is the "use of * * * [federal] facilities that give[s] rise to the obligation." *Ibid.*

c. Respondent ultimately acknowledges that Congress *could* have adopted a permissible user fee for port facilities. Respondent contends only that such a fee should be based upon tonnage or other factors that respondent thinks might more closely relate the costs to be recovered to the benefits conferred (Br. in Opp. 20).[2] As Judge Mayer emphasized in dissent (Pet. App. 39a), however, Congress rationally determined that an *ad valorem* fee was "the only acceptable basis on which to impose such charges" for port services (S. Rep. No. 228, 99th Cong., 1st Sess. 5-6 (1986)). In rejecting that determination, the court of appeals failed to honor the wide "latitude of discretion which the legislature is entitled to exercise in the selection of the" method for calculating a fee. *Fairbank* v. *United States*, 181 U.S. at 304. See also Pet. 23-24.[3]

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[2] Respondent states that Congress could enact "a *bona fide* user fee to replace" the Harbor Maintenance Tax and that "[t]here are many ways by which this could be done" (Br. in Opp. 20).

[3] Respondent disputes that "Congress understood the [Harbor Maintenance Tax] to be a user fee rather than a tax" (Br. in Opp. 11 n.5). Respondent claims that the history of this legislation "reveals doubts" about its constitutionality (*ibid.*). It is true that the report of the House Committee on Merchant Marine and Fisheries expressed the concern that the port use charge could be deemed unconstitutional if it were viewed as a revenue raising measure. H.R. Rep. No. 251, 99th Cong., 1st Sess., Pt. 4, at 23 (1985). The Committee explained, however, that the fee is constitutional because it "is, in fact, intended as a fee that is reasonably related to the services financed by the fee." *Id.* at 24. Congress consistently expressed the understanding that the "port user charges" imposed by this provision represent a user fee, rather than a "tax," in the constitutional sense. See, *e.g.*, S. Rep. No. 228, *supra*, at 5.

Respondent also asserts that the port use fee is a "tax" rather than a "fee" because the word "tax" appears in its text and title and it is codified in the Internal Revenue Code (Br. in Opp. 11 n.5). This Court has frequently noted, however, that, in determining whether a user fee is permissible or proscribed, the name of the exaction is immaterial, for the Constitution "regard[s] things rather than names." *Fairbank*

d. Respondent errs in contending (Br. in Opp. 14-15) that the port use charge is constitutionally defective because the Harbor Maintenance Trust Fund, to which the fees are deposited, enjoys a positive balance. In *Massachusetts* v. *United States*, 435 U.S. at 470 n.25, this Court rejected the contention that a surplus in a trust fund for the provision of federal services makes the government fee for such services unconstitutional. See also Pet. 17 n.4.[4] Respondent fails to address that holding in reurging the same contention here. See Br. in Opp. 14-15.

2. In holding the Harbor Maintenance Tax unconstitutional as a tax on exports, the Federal Circuit has thus seriously misapplied the precedents of this Court. This misapplication of the "high prerogative of declaring invalid an act of Congress" (*Untermyer* v. *Anderson*, 276 U.S. 440, 453 (1928) (Brandeis, J., dissenting)) warrants review by this Court.

Respondent does not dispute that the port use fees for which refunds are sought in the 4000 pending cases exceed several hundred million dollars. Those fees were designated by Congress solely and specifically for the development and operation of the Nation's port facilities. Congress enacted this statutory fee as an essential component of the complex legislative plan adopted in the Water Resources Development Act for the operation and improvement of vital but long-neglected port facilities. See, *e.g.*, S. Rep. No. 126, 99th Cong., 1st Sess. 3-4 (1985); H.R. Rep. No. 251, *supra*, Pt. 4, at 42; 132 Cong. Rec. 4921-4923 (1986) (Sen. Abdnor); *id.* at 4937-4938, 4940 (Sen. Moynihan); *id.* at 4958-4959 (Sen. Bentsen). By misapplying constitutional precedent, the court of appeals has torn apart this carefully designed legislative scheme for the funding and operation of the Nation's ports. Review by this Court is warranted to protect the "obvious interest [of Congress] in making those who specifically benefit from its services pay the cost" (*Massachusetts* v. *United States*, 435 U.S. at 462).

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For the reasons stated above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Acting Solicitor General

OCTOBER 1997

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v. *United States*, 181 U.S. at 304 (quoting *Pace* v. *Burgess*, 92 U.S. 372, 376 (1876)).

[4] Moreover, respondent has misdescribed the use that may be made of the current surplus in this trust fund. Respondent states that the "surplus is * * * invested in Government obligations (26 U.S.C. § 9602(b)(1)) and thereby returned to the Treasury for general public use" (Br. in Opp. 14). The fact that the trustee is to invest the trust funds "in interest-bearing obligations of the United States" (26 U.S.C. 9602(b)(1)) obviously does not mean that the trust funds are "for general public use." Instead, just as is the case when any *other* investor purchases government bonds, the interest earned on the bonds is paid to the trust and is not retained by the United States. 26 U.S.C. 9505(a)(3); 26 U.S.C. 9602(b)(3).